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January 25, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
TW-A325
Washington, D.C. 20554

Re: WT Docket No. 98-205,
WT Docket No. 96-59,
GN Docket No. 93-252

Dear Ms. Salas:

Enclosed please find an original and four copies of the Comments of Chase Capital Partners ("CCP") in the above-referenced proceedings. A copy of this submission also shall be submitted via the Internet, pursuant to the Notice of Proposed Rulemaking in this proceeding.

Kindly direct any questions concerning this submission to CCP's undersigned counsel.

Very truly yours,

E. Ashton Johnston
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review — Spectrum Aggregation Limits for Wireless Telecommunications Carriers	)	WT Docket No. 98-205
	)	
Cellular Telecommunications Industry Association's Petition for Forbearance from the 45 MHZ CMRS Spectrum Cap	)	
	)	
Amendment of Parts 20 and 24 of the Commission's Rules — Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	WT Docket No. 96-59
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252

COMMENTS OF CHASE CAPITAL PARTNERS

Chase Capital Partners ("CCP"), by its attorneys, hereby submits its comments in response to the *Notice of Proposed Rulemaking*, FCC 98-308, released December 10, 1998 in the above-captioned proceeding (the "*NPRM*"). The following is respectfully shown:

I. Statement of Interest

CCP is a global private equity organization with approximately $7 billion under management. CCP's sole limited partner is The Chase Manhattan Corporation, one of the largest bank holding companies in the United States, with assets of approximately $366 billion. CCP and its affiliates have a diverse portfolio of investments in numerous media,

entertainment and telecommunications companies, many of which hold licenses from the Commission. CCP's telecommunications investments include providers of various Commercial Mobile Radio Services ("CMRS") governed by the Commission's spectrum cap and cross-ownership rules and policies that are the subject of this proceeding.

CCP has direct experience with the limitations the Commission's existing spectrum cap rule places on a financial investor's ability and incentive to provide equity financing to CMRS providers. CCP, through certain of its wholly owned affiliates, holds interests in Triton Cellular Partners, L.P. ("Triton Cellular"), the parent of Triton Communications L.L.C. ("Triton Communications"), a Rural Service Area cellular licensee, and in TeleCorp PCS, Inc. ("TeleCorp"), a broadband PCS licensee. Triton Communications and TeleCorp have service areas that overlap just under 12% of the population in ten rural counties in Mississippi, which exceeds the 10% "significant overlap" limit specified in the spectrum cap rule, 47 C.F.R. §§ 20.6(a), (c). Because CCP holds interests in these two unrelated entities that are deemed "attributable" under the existing spectrum cap rule, Triton Communications has requested a waiver of Section 20.6.[1/] Based on CCP's experience, Section 20.6 defines too narrowly what constitutes an attributable interest and thus has the effect of reducing the availability of capital to CMRS providers. Given the likelihood that CCP and other institutional investors will be impeded in their efforts to provide critical financing to CMRS

1/ See Request of Triton Communications L.L.C. for Waiver of Section 20.6, July 17, 1998 and *NPRM*, para. 27. In response to the Triton request, the Wireless Telecommunications Bureau extended the deadline for Triton to come into compliance with the rule pending action on the waiver request. *See NPRM*, n.72.

providers if Section 20.6 is not amended as set forth below, CCP is highly qualified to offer the following comments on the *NPRM*.

II. Background

Under the Commission's existing limit on spectrum aggregation, a single entity may have "attributable" interests in a maximum of 45 MHz, or 25%, of an available total of 180 MHz of CMRS (i.e., cellular, broadband Personal Communications Service ("PCS"), and Specialized Mobile Radio ("SMR")) spectrum when there is a "significant overlap" within the same geographic area covered by licenses authorizing the use of such spectrum. 47 C.F.R. § 20.6(a). For purposes of determining compliance with this rule, controlling interests, ownership interests of 20% or more (40% if held by small businesses and rural telephone companies), certain non-equity interests such as management agreements and joint marketing activities, and officer and director positions, are deemed attributable. 47 C.F.R. §§ 20.6(d)(1)-(7). "Significant overlap" is defined as an overlap between geographic areas or licensed contours that contains 10% or more of a market's population. 47 C.F.R. § 20.6(c).

The *NPRM* seeks comment on six alternatives to the existing spectrum cap rule: (1) change the "significant overlap" threshold; (2) change the 45 MHz cap; (3) change the 20% and 40% ownership attribution benchmarks; (4) forbear from enforcing the cap; (5) sunset the cap in whole or in part; and (6) eliminate the cap. As explained below, CCP believes that the public interest will be served by amending the attribution standard in the spectrum cap rule.

III. CCP Supports Modifications to the CMRS Spectrum Cap Attribution Standard

Wholesale changes to, or elimination of, the spectrum cap may not be appropriate at this time.[2/] Certain modifications to the rule, however, would serve to increase the availability of capital and promote competition among and between providers of CMRS and other services. CCP therefore urges the Commission to incorporate the following changes to the CMRS spectrum cap rule: First, the rule should include a definition of "institutional investor" similar to the broadband PCS definition. Second, the 20% and 40% ownership benchmarks to determine attribution should be eliminated and replaced with a control test for institutional investors. Finally, the attribution standard should provide exceptions for "insulated" interest holders and certain other ownership interests. Each proposed change is addressed below.

A. Section 20.6 Should Define Institutional Investors and Generally Deem Them Non-Attributable

Unlike other Commission rules governing the attribution of ownership interests, Section 20.6 does not define institutional investors nor does it provide exceptions from attribution for interests held by such investors. This discrepancy should be remedied by amending the rule to specifically include such a definition and exceptions.

2/ CCP notes that the Commission is considering allocating additional spectrum for services that will compete with CMRS. *See Public Notice*, "Commission Staff Seek Comment on Spectrum Issues Related to Third Generation Wireless/IMT-2000," DA 98-1703, released August 26, 1998. CCP believes that any benefits associated with sunsetting or eliminating the CMRS spectrum cap are likely to become clearer only as the licensing of such additional spectrum approaches. CCP further believes that case-by-case forbearance is a second-best alternative to specific rules that provide clear guidance to investors and licensees alike.

Elsewhere in its rules, the Commission has acknowledged the critical role that institutional investors play in capital formation with respect to service providers in competitive markets. For example, for purposes of determining eligibility for Designated Entity status in broadband PCS, an institutional investor has been defined to include a wide range of investment companies, including Small Business Investment Companies ("SBICs") and venture capital firms.[3/] Under these rules, an institutional investor may hold up to 49.9% of a licensee's equity, 25% of which may be voting equity, and also may have material involvement in the affairs of the company without being deemed attributable, provided that de facto control of the company remains with qualified investors (as defined by the rules).[4/] The Commission also has adopted a specific definition of "non-attributable equity" which deems voting equity of 25% or less, and limited partnership and other interests that do not afford the power to control the company, to be non-attributable.[5/] The Commission's rules governing attribution of interests in broadcast and other media facilities also include exceptions for institutional investors.[6/]

3/ 47 C.F.R. § 24.720(h).

4/ 7 C.F.R. §§ 24.709(b)(4), (6).

5/ 47 C.F.R. §§ 24.720(j)(1), (2).

6 *See, e.g.*, 47 C.F.R. § 73.3555, Note 2(c). The Commission is considering expanding this exception, which defines institutional investor more narrowly than the broadband PCS rule. *See Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, 10 FCC Rcd 3606 (1995).

CCP believes that Section 20.6 should be amended to include definitions of institutional investor and non-attributable equity similar to those contained in the broadband PCS rules cited above. Moreover, as set forth in Part III.B, institutional investors generally should be deemed non-attributable for purposes of Section 20.6.

B. Non-Controlling Interests of Institutional Investors Should Be Non-Attributable

Under the existing spectrum cap rule, an interest of 20% or more held by any investor is deemed attributable, as are officers and directors.[7/] This rule should be amended to provide an exception for institutional investors who do not exercise or have the potential to exercise control of, and do not have a majority equity interest in, a CMRS licensee. Consistent with the broadband PCS rules, an institutional investor who holds an officer or director position in a CMRS licensee also should not be deemed attributable for purposes of Section 20.6 when such an investor does not hold de facto or de jure control of the licensee.

In the *NPRM*, the Commission requested comment on the effect of raising the 20% attribution threshold on a minority investor's ability to control a CMRS licensee. *NPRM*, para. 60. CCP's proposed change should not raise concerns about unlawful transfers of de facto control to minority investors. The Commission has "long recognized a distinction between institutional investors and other investors," and has expressly recognized the inherently passive nature of institutional investors, stating "institutional investors' market activities generally do not raise the type of 'control' issues that led us to adopt 'bright line'

7/ 47 C.F.R. § 20.6(d)(2),(7).

PCS attribution rules."[8/] The reason is that institutional investors generally have neither the expertise nor the desire to direct the day-to-day operations of a portfolio company. Instead, they rely on skilled management and business, technical, and operating personnel to run a company in which they have invested, and protect their investments through contractual provisions that establish minority investor safeguards.[9/] Indeed, due to the nature of its investment activities, CCP has no controlling interests of any kind in any of its media or telecommunications investments.[10/] By contrast, a non-financial, or strategic, investor has a

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8/ *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 10 FCC Rcd 7893 (1995), para. 11. *See also Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, 7 FCC Rcd 2654 (1992), para. 10 ("the inherently passive nature of [institutional] investors ... will adequately prevent undue influence that might otherwise be associated with the 20% benchmark"); *Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, 10 FCC Rcd 3606, 3611 (1995) (citing trend of increasing attribution benchmarks for institutional investors that "generally acquir[e] their stock for investment purposes, with no intent to influence or control....").

9/ *See* Pratt's Guide to Venture Capital Sources, 1998 Edition, at 37: "While most [venture capital] investors expect that the entrepreneur and management team will control and operate the business without interference from the investors, the investment structure will typically provide for the investors to participate in the management and operation of the company (a) through representation on the Board of Directors, (b) through the restrictions and limitations imposed by the affirmative and negative covenants in the Securities Purchase Agreement or terms of the equity or debt securities, and (c) through stock transfer restrictions on the equity interests held by the management team imposed under the Stockholders Agreement.... In general, the investment structures are designed to permit the entrepreneur and management team to operate the business without substantial participation by the [venture capital] investors (except at the Board of Directors level)...."

10/ In the normal course, CCP works with management of its portfolio companies by providing advice and assistance in financings, acquisitions, and other strategic issues, and offers access to a broad network of operating, financial, and other relationships to support the development of the company. CCP often, but not always, is represented on the board of directors

(continued...)

vested interest in the operations of a licensee, and thus has an incentive to maximize its control over day-to-day operations.

C. Other Exceptions to the Attribution Standard Also Should Be Codified

As the Commission noted in the *NPRM*, the ownership threshold that triggers attribution generally is higher for CMRS than for non-commercial mobile services.[11/] While it thus may appear that the CMRS attribution rules already are more relaxed than rules governing other services, several exceptions are contained in non-CMRS service rules that have no corollary in the CMRS spectrum cap rule.[12/]

First, the ownership interests of limited partners who are not materially involved, directly or indirectly, in a media company's activities of the partnership are deemed non-attributable.[13/] In contrast, under Section 20.6 all interests of 20% or greater, including limited partner interests, are attributable. Second, under the media attribution rules, a minority voting stock interest is deemed non-attributable if there is a single holder of more than 50% of a media company's voting stock.[14/] No comparable exception exists for

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(...continued)
of a company in which it has an investment, but does not become involved in the day-to-day operations of a portfolio company.

11/ *NPRM*, para.60.

12/ The Commission's rules do allow parties to seek rule waivers, 47 C.F.R. § 20.6 Note 3, but the waiver process is less than ideal for purposes of structuring financial investments.

13/ 47 C.F.R. § 73.3555, Note 2(g)(1).

14/ 47 C.F.R. § 73.3555, Note 2(b).

purposes of CMRS attribution. Third, under the media cross-ownership policy a single entity may have both an attributable interest in one company and a non-attributable interest of up to 33% in a licensee in the same area.[15/] Moreover, as a result of an increase in the number of broadcast stations one company may own in a market, there are fewer instances where the media multiple ownership rules and cross-ownership rules and policies will apply. In contrast, interests of 20% in just two CMRS entities whose "markets" share 10% of the population will constitute a violation of the Section 20.6 attribution standard.

As a source of capital for all segments of the media and communications industry, CCP believes that conforming the Commission's rules to the fullest extent possible will benefit all parties subject to those rules. As noted in the *NPRM*, numerous parties have sought relief from Section 20.6.[16/] The disparate attribution rules unnecessarily affect the formation of telecommunications ventures and can distort the flow of capital. Existing and future Commission licensees, as well as sources of capital for such licensees, will be benefited by the changes proposed herein. As the Commission has recognized, increasing attribution benchmarks for institutional investors "may well attract new sources of capital..., would inevitably create greater flexibility for existing investors," and may "be particularly

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15/ *See, e.g., Roy M. Speer*, 11 FCC Rcd 18393 (1996).

16/ *NPRM*, paras. 25-26.

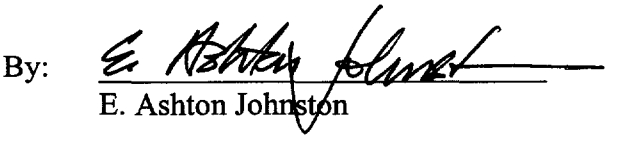
effective in increasing capital availability."[17/] The existing attribution standard in Section 20.6 artificially restricts both competition among sources of capital and licensees' ability to attract capital by limiting the availability of funds for CMRS. Consequently, CCP urges the Commission to adopt the above attribution exceptions and otherwise amend Section 20.6 as requested herein.

IV. Conclusion

WHEREFORE, the foregoing premises having been duly considered, Chase Capital Partners respectfully requests that the Commission amend Section 20.6 of its rules consistent with the foregoing comments.

Respectfully submitted,

CHASE CAPITAL PARTNERS

By: 
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January 25, 1999

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17/ *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, 7 FCC Rcd 2654, paras. 9, 10.